

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8630

File: 21-356184 Reg: 06062300

DEBY O'GORMAN and KELLY O'GORMAN, dba Tahoe Keys Liquor Market
2297 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: July 12, 2007
San Francisco, CA

ISSUED NOVEMBER 7, 2007

Deby O'Gorman and Kelly O'Gorman, doing business as Tahoe Keys Liquor Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with five of those days conditionally stayed for a probationary period of one year, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Deby O'Gorman and Kelly O'Gorman, appearing through Deby O'Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated October 17, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 20, 1999. On March 23, 2006, the Department filed an accusation against appellants charging that, on December 30, 2005, their clerk sold an alcoholic beverage to 19-year-old Mark Dalforno. Although not noted in the accusation, Dalforno was working as a minor decoy for the South Lake Tahoe Police Department at the time.

At the administrative hearing held on August 24, 2006, documentary evidence was received and testimony concerning the sale was presented. It was established that the decoy presented the clerk with his valid California driver's license, which bore a red band with white letters on it showing the decoy would not be 21 until 2007. The clerk looked at the driver's license, handed it back to the decoy, and proceeded to sell a 12-pack of beer to the decoy. After leaving the store, the decoy returned and identified the seller from two or three feet away.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants filed an appeal contending that the Department abused its discretion in filing an accusation against them.

DISCUSSION

Appellants contend the Department abused its discretion in filing this accusation against them because it failed to consider all the factors involved, both positive and negative, which would have been apparent had the Department maintained full, complete, and accurate records regarding its licensees. They assert that they put great effort into preventing underage sales and have received several notices of successful performance in other decoy operations. Their efforts include emphasizing to their employees the importance of checking identification, attending training, and installing

scanners to verify patrons' ID's. They do not deny that their clerk sold beer to the decoy, but contend that the Department abuses its discretion when it files accusations, rather than just warning letters, against licensees, like themselves, who work hard to be "a part of the solution and not a part of the problem."

The California Constitution, article XX, section 22, grants the Department "the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." The Department's discretion, while not unlimited, is quite broad, especially in matters such as this, where a number of reasonable choices could be made about how to proceed. The Department's discretion is not abused unless its action is unreasonable or arbitrary.

In determining whether there has been an abuse of discretion the Supreme Court of this state has stated that "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the . . . [administrative body] acted within the area of its discretion." (*Harris v. Alcoholic Beverage etc. Appeals Board* [(1965) 62 Cal.2d 588,] 594 [[43 Cal.Rptr. 633, 400 P.2d 745]]; see also *Martin v. Alcoholic Beverage etc. Appeals Board* [(1959)] 52 Cal.2d [287,] 294 [[341 P.2d 294]].) It is equally well settled that in reviewing the penalty imposed by an administrative body which is duly constituted to announce and enforce such penalties, neither a trial court nor an appellate court is free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh. (See *Macfarlane v. Department of Alcoholic Beverage Control* [(1958) 51 Cal.2d 84,] 91 [[330 P.2d 769]].) Such interference, in the light of the foregoing authorities, will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion.

(*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

While some might agree that issuing a warning letter would be appropriate in the circumstances here, we cannot say that issuing an accusation was unreasonable. It is

certainly not unreasonable for the Department to file an accusation in a case where it appears that a violation has occurred.

The factors appellants want taken into consideration before an accusation is filed are ordinarily considered factors in mitigation of any penalty imposed. In the present case, it is clear these factors were treated as justifying reduction of the penalty. The Department recommended a 15-day suspension, but the ALJ proposed, and the Department adopted, a considerable reduction: a 10-day suspension with five of the days stayed, conditional upon a year of discipline-free operation. If no further violation occurs in that year, appellants will have only a five-day suspension. In addition, appellants apparently are eligible to pay a fine and serve no suspension at all.

It appears that appellants are very conscientious licensees and they are to be commended for their efforts. However, the Board's authority in reviewing this decision is limited to determining whether or not the Department abused its discretion. We cannot say that it did.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.